MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-39

MEMPHIS LIGHT, GAS AND WATER DIVISION, et. al.

Petitioners,

V.

WILLIE S. CRAFT, et. al.

Respondents

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A of Petition) is now reported at 534 F.2d 684. The opinion of the District Court is not reported, but is printed as Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

1. Whether continued utility service is a property interest which is protected by the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment and the Charter of the City of Memphis are set forth in Appendix C of the Petition.

STATEMENT OF THE CASE

This case was initiated pursuant to 42 U.S.C. §1983 on behalf of four plaintiffs alleging due process violations stemming from petitioners' terminations of service and refusal to initiate service. One plaintiff, whose discontinuance occured due to her failure to pay charges for usage "about which there was no dispute" has been dismissed. Craft v. Memphis Light, Gas and Water Division, 534 F.2d 684, 685 n.1 (6th Cir. 1976). Another plaintiff's claim (Ida Bell Holmes) that petitioners' refusal to initiate service to her was a violation of the equal protection clause was upheld by the Sixth Circuit and petitioners seek no review of that portion of the decision. Nor is review sought concerning the Sixth Circuit's holding with regard to Ms. Sarah Parks.

The remaining respondents present a factual situation of a municipally owned utility company terminating service when a bona-fide dispute as to customer liability exists. With respect to respondent Crafts (representing a family of 13) the failure of petitioners to provide any procedures for resolution of disputed billings (either before or after termination) resulted in at least four separate terminations of utility service due to petitioners' erroneous double billing for services rendered. It is from the Sixth Circuit Court of Appeals decision, holding that a summary termination procedure (as applied to respondents) was insufficient under the Due Process Clause of the Fourteenth Amendment, that the Writ

ARGUMENT

I.

There Is No Conflict Of Decisions
Of The United States Courts of Appeals

The singular issue[1] raised by this case is whether respondents possess a sufficient "property interest" in utility services to invoke the procedural protections of the Due Process Clause. In contrast to petitioner's representation to the Court, no current conflict with respect to this issue is currently present in the circuits. Two decisions alluding to the matter are in accord with the Sixth Circuit. Davis v. Weir, 497 F.2d 139, 144 (5th Cir. 1974), implicitly found a property interest in water service for purposes of the Equal Protection Clause, and Lucas v. Wisconsin Electric Power Co., 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973) assumed a property right in continued services, although holding that the private power company did not meet the "state action" requirement.

The analysis provided by the Third Circuit in Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3rd Cir. 1973), aff'd, 419 U.S. 345, while alluding to the non-property status of utility services, 483 F.2d at 762, based its holding on the failure to successfully raise a 1983 claim in the absence of making the necessary showing of state action. 483 F.2d at 758-61. In affirming Jackson, this Court limited its decision to the state action question and expressed no opinion concerning whether utility service was "property" for purposes of the Due Process Clause. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 359. It is thus apparent that no conflict of decisions exists among the Courts of Appeals.[2]

II.

No Substantial Reason Exists
For Granting The Writ

The court below "implicitly assumed" that a claim to continued utility service constitutes "property" for due process purposes. Two decisions this past Term, however, clearly establish that the right asserted by respondents in this case carries with it the protections of Due Process. As such, the decision below does not present an important question of federal law not heretofore settled by this Court.

In Paul v. Davis, 96 S.Ct. 1155 (1976), the Court referred to its past approaches to defining property interests protected by procedural due process[3] and concluded that absent the deprivation of a right previously held under state law, invocation of procedural safeguards was improper. Again, in Bishop v. Wood, 96 S.Ct. 2074 (1976), the Court denied a public employee's claim to a due process hearing on the basis

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[1] Petitioner attempts to raise collateral issues which are either: (1) of no constitutional significance; or (2) not properly before the Court. Being a municipally owned utility, there is obviously the necessary "state action" for a 1983 claim. While some argument is made concerning the constitutional scope of hearing procedures under the Due Process Clause, it is quite obvious that the complete lack of any grievance mechanism fails to meet the rudimentary requirement for informal hearings. See, e.g., Morrissey v.

[2] Also significant is the fact that a number of District Court holdings on the issue are in accord with the Sixth Circuit. See Koger v. Guarino, 44 U.S.L.W. 2528 (E.D.Pa. 1976); Condosta v. Vermont Electric Cooperative, Inc., 400 F. Supp. 385, 365-366 (D.Vt. 1975); Donnelly v. City of Eureka, 399 F. Supp. 64, 67-68 (D.Kan. 1975); Limuel v. Southern Union Gas Co., 378 F. Supp. 964, 966-67 (W.D.Tex. 1974); Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 447 (S.D.N.Y. 1972); Stanford v. Gas Service Co., 346 F. Supp. 717, 721 (D.Kan. 1972).

[3] As stated in Board of Regents v. Roth, 408 U.S. 564, 577:

[Property interests] are not created by the Constitution. Rather, they are created and their dimensions

that his employment --as defined by state law--was not a "property interest," i.e., the position was held at the will and pleasure of the state.

In contrast to these holdings it is clear that under Tennessee state law, respondents are entitled to services provided by petitioners after having paid required deposits and all charges validly assessed[4] by petitoners.[5] Crumley v. Watauga Water Co., 99 Tenn, 420, 41 S.W. 1058 (1897). It is well settled under state law, that a utility company is charged with a public duty of furnishing utility service to all inhabitants of the city of its location without discrimination and without denial except for good and sufficient cause. Farmer v. Mayor and City Council of Nashville, 127 Tenn. 509, 156 S.W. 189 (1913). Thus, petitioners, in terminating the utility service of respondents, have deprived them of a right or status which is recognized by state law. The Court of Appeals decision, therefore, is in accord with the recent decisions of this Court.

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[4] With respect to this issue, it should also be noted that although not sanctioned by Rule 19, petitoner raises as a ground for granting the writ an alleged conflict between the Sixth Circuit and the Tennessee Supreme Court on the issue of whether the providing of utility service is a property right. The state cases relied upon, however, Patterson v. City of Chattanooga, 192 Tenn. 267, 241 S.W.2d 291 (1951), and Jones v. Mayor, Etc. of Nashville, 109 Tenn. 550, 72 S.W. 985 (1903), only relate to a loss of the "right" for nonpayment of correctly imposed charges, a proposition not disputed by respondents or the Court below.

[5] Accord, Lucas v. Wisconsin Electric Power Co., 466 F.2d 638, 646 n. 13 (7th Cir. 1972) ("right" to utility service pursuant to the Wisconsin code.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas M. Daniel

Thomas M. Daniel
Counsel for Respondents

Certificate Of Service

This is to certify that I have served upon opposing counsel this Brief for Respondent In Opposition by mailing a copy thereof to Mr. Frierson M. Graves, Jr., 2020 First National Bank Building, Memphis, Tennessee 38103 on this 6th day of August, 1976.

Thomas M. Daniel

THOMAS M. DANIEL